thing would be to interpret the plan document, if possible, first. . . ." *Id.*

The plaintiffs then moved for summary judgment only on Count I of the Complaint – the claim for benefits provided in an ERISA plan pursuant to 29 U.S.C. § 1132 (a)(1)(B). They contended (contrary to the allegations of the Amended Complaint) that the operative "plan document" was the 1994 Amendment to the Hancock Plan. They noted that briefing of the issue of reliance on the SPD had been postponed and would be relevant only if it became necessary to reach plaintiffs' other theories of liability. A00325, A00339, A00353, A00479.

The District Court granted summary judgment for the plaintiffs. It held that the Plan Administrator's interpretation of the Hancock Plan was an abuse of discretion and that the plaintiffs were, under the terms of the Plan, entitled to the benefits that they sought. PA. 29a-36a.

D. Proceedings In The Court Of Appeals.

On appeal, Hancock argued (1) that the Hancock Plan granted the Plan Administrator discretionary authority to interpret the Plan; (2) that, under the terms of the Plan, the plaintiffs were entitled to receive full benefits beginning at age 65 or reduced benefits calculated from age 65; and (3) that the plaintiffs could not prevail based on their interpretation of the SPD without also establishing that they relied on a relevant statement in the SPD – an issue that, by agreement, had not been considered in the District Court, and was not ripe for consideration by the Court of Appeals.

In response, plaintiffs contended that they were entitled to prevail under the terms of the Hancock Plan. Those terms,

they asserted, were stated in the 1994 Amendment to the Hancock Plan which broadened eligibility for retirement at full benefits prior to age 65 for certain Hancock employees. The plaintiffs said that "[t]he cornerstone for Plaintiffs' claims is the 1994 Amendment itself, *rather than the SPDs* and other post-amendment documents created by Hancock." Appellees' Br. at 19 (emphasis supplied).[3]

Plaintiffs argued that the SPD should be used as an aid to the interpretation of the Plan itself. They asserted that their interpretation of the 1994 Amendment was "confirmed" by the language of the SPDs. Appellees' Br. at 20 and n.9 ("the District Court did not err in using the updated SPDs to inform its reading of the Plan"), p. 22 (same), p. 26 ("SPDs may and should be reviewed to aid in interpreting the meaning of the Pension Plan"). The plaintiffs did not contend that the SPD was a "plan document." They did not assert that Section 1132(a)(1)(B) authorized the recovery of benefits that are stated in an SPD, but not in an ERISA plan. They did not challenge the First Circuit's requirement that reliance be proven in order to recover a benefit stated only in an SPD. And, they did not present argument relating to reliance. Indeed, they criticized Hancock for even mentioning the subject of reliance. Appellees' Brief, p. 1 ("The issue of detrimental reliance is not part of this appeal. As Hancock concedes, the District Court directed the parties *not* to brief the

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[3] The plaintiffs attacked the Plan Administrator's interpretation because it was based on the 1995 Restatement of the Hancock Plan, which the plaintiffs characterized as a "non-integrated Plan document." Appellees' Br. at 44-48. They asserted that the 1995 Restatement should be read together with the 1994 Amendment (Appellees' Br at 48-50), and, even if read in isolation, supported plaintiffs' position. Appellees' Br. at 51-56.

reliance issue (which is relevant only to Counts II and III of the Amended Complaint), and to focus only on Count I"). (Emphasis by plaintiffs.)

The Court of Appeals upheld the Hancock Plan Administrator's decision. It observed that "ERISA authorizes a plan participant . . . to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B); 400 F.3d at 87. It held that the 1995 Restatement was a "comprehensive recitation of the terms of the [Hancock] Plan," that it encompassed all amendments made prior to January 1, 1995 (including, in particular, the 1994 Plan Amendment), and that it was the document that should be construed. *Id.* at 89.

Next, the Court ruled that, under the terms of the Hancock Plan, the Plan Administrator had discretionary authority to interpret the Plan. As a result, the Administrator's interpretation could be overturned only if it were arbitrary and capricious. *Id.* at 89-90, citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

The Court of Appeals then analyzed the terms of the Plan. It concluded that the Plan Administrator's interpretation was correct, and "should not be disturbed." The Court held that there was a specific plan provision that governed the rights of plan participants, like the plaintiffs, whose service "terminated other than by retirement." They were to receive a full pension benefit beginning at age 65, or a reduced benefit calculated from age 65 if they elected early retirement. *Id.* at 91-92. The Court said that plaintiffs had identified "no ambiguous language" in the Plan (*id.* at 89), and had offered no "coherent or persuasive" alternate interpretation of the Plan. *Id.* at 92. There was, as a result, no occasion to consult extrinsic evidence to aid in the interpretation of the Plan.

The Court reversed the summary judgment granted in the District Court on Count I of the Complaint, and remanded the case for consideration of plaintiffs' other theories of recovery. It said that the District Court "appropriately deferred consideration of reliance until it decided the summary judgment motions as to the first count. On remand, the issue of reliance may be relevant to the former employees'" claims under other counts. *Id.*

ARGUMENT

In their Petition, the plaintiffs abandon the arguments that they made in the Court of Appeals and advance contentions that were either not made at all, or were made only in passing in the court below. Hancock will demonstrate, first, that the decision of the Court of Appeals is correct, of narrow scope, and wholly unworthy of further review. Hancock will then establish that the arguments now advanced by the plaintiffs (1) were neither presented to, nor addressed by, the Court of Appeals, (2) are, in any event, erroneous, and (3) in some instances, are not ripe for appellate consideration.

I. The Decision Below Was Correct And Does Not Present Any Issue That Is Worthy Of Supreme Court Review.

A. The Plan Administrator Was Given Discretionary Authority To Interpret The Hancock Plan.

This Court held in *Firestone Tire & Rubber Co.*, 489 U.S. at 113, that when an ERISA plan grants the plan administrator discretionary authority to construe the plan,

the administrator's plan interpretation should be affirmed unless it is "arbitrary and capricious." The Hancock Plan states that Hancock, as Plan Administrator "shall interpret the Plan and determine all questions arising under it. Any such determination . . . shall be binding on all persons affected thereby." RA.17-18.

Both the District Court and the Court of Appeals held that this language granted to the Administrator discretionary authority to interpret the Hancock Plan. They accurately state the rule of law established in *Firestone* and apply it to the particular language of the Hancock Plan. No broader issue was presented. No conflict among the Courts of Appeal exists. The decisions below were correct, and are not challenged in this Court.

B. The Court of Appeals' Interpretation Of The Hancock Plan Was Correct And Does Not Present An Issue That Is Appropriate For Further Review.

ERISA requires that all employee benefit plans be established and maintained pursuant to a written instrument. 29 U.S.C. § 1102(a)(1). The Amended Complaint alleges that the 1995 Plan Restatement is the relevant instrument. A00058, A00060-62, A00112-59. The Court of Appeals determined that the 1995 Restatement is the document that sets forth the terms of the Hancock Plan. 400 F.3d at 89. Its determination was correct, is not challenged in the instant Petition, is specific to the facts of this case, and will have little or no precedential effect.

1. The Plaintiffs' Rights Under The Hancock Plan.

Article III of the Hancock Plan states the dates when plan participants may, and when they must, retire. In general, plan participants must retire at age 65 (the participant's "Normal Retirement Date"). Certain participants, including the plaintiffs, may elect early retirement when they reach age 50 or on the first day of any month thereafter until they reach age 65. RA.13.

Article IV of the Plan states the amount of each participant's pension benefit. In general, benefit amounts are a function of a participant's length of service and salary in his/her last years of employment. RA.13-17.

Article VIII describes a participant's entitlement to benefits in the event that the participant's Hancock Service (his employment by Hancock or an affiliate) is "terminated other than by retirement." Section 8.1 governs the plaintiffs' claim. It states that a participant whose service is terminated other than by retirement may receive a full pension beginning at age 65 or, if the participant elects early retirement, a reduced benefit calculated in accordance with Plan Section 4.3, *viz.*:

> If the Service of a Participant who has completed at least five (5) Years of Service is terminated, other than by retirement, such Participant will . . . be entitled to receive
>
> (A) a yearly amount of Pension determined in accordance with Section 4.1 [*i.e.*, a full pension] commencing on the first day of the month in which he attains age sixty-five (65), or

> (B) the Pension described in (A) above subject to a reduction as described in Section 4.3, commencing on the first day of any month on or after the month in which he meets any of the requirements for Early Retirement described in Section 3.2 [age 50, as applied to the plaintiffs].

RA.17.

The plaintiffs' Hancock Service was "terminated other than by retirement" when the business unit in which they were employed was sold. None had then reached age 50. As a result, none were then eligible for early retirement. The plaintiffs could not, and they did not, retire from service. Therefore, each plaintiff was entitled to receive a full pension beginning at age 65.

Plan Section 4.3(B)(ii) states that if a participant opts for early retirement, the resulting pension reduction is to be calculated from age 65. It provides that "in the case of a Participant who terminated from service prior to his Early Retirement Date" – *i.e.* the plaintiffs – the Participant would receive the pension amount that "would be payable to him if his Early Retirement Date were his Normal Retirement Date [age 65]", less 0.4% per month for each month that the Participant's "Early Retirement Date precedes . . . his Normal Retirement Date." RA.16 (Section 4.3(b)); RA.12-13 (defining Early Retirement Date and Normal Retirement Date).

Finally, Section 4.2(B) of the Plan, which defines the benefits for employees who have at least twenty-five years of service, and which contains language that the plaintiffs cited in support of their benefits claim, states expressly

that rights under Section 4.2(B) are "subject to any applicable Sections of this Article [IV] and Article[] . . . VIII" – *i.e.*, are subject to Sections 8.1 and 4.3(B)(ii), quoted above. RA.13, 14.

The Court of Appeals held that the terms of the Hancock Plan were clear, that plaintiffs had identified no ambiguity in the plan language, and that the Plan Administrator's interpretation of the Plan was consistent with (indeed, was compelled by) the terms of the Plan and "should not be disturbed." 400 F.3d at 91, 92.

In this Court, the plaintiffs do not challenge this ruling. The Court of Appeals' interpretation of the Hancock Plan is manifestly inappropriate for review by this Court. It rests entirely on the interpretation of the particular words of the Hancock Plan, as applied to a small subset of Hancock Plan participants. It will have no effect on the interpretation of other ERISA plans, or even on the Hancock Plan as applied to most other Plan participants.

2. The Court of Appeals Held Correctly That The 1994 Amendment Did Not Assist The Plaintiffs.

The plaintiffs argued in the Court of Appeals that the 1994 Amendment to the Hancock Plan provided the benefits that they claimed. This argument was, as the Court of Appeals held, entirely without merit.

The 1994 Amendment (RA.19-20) consists of slightly more than one typed page. It is not, and does not purport to be, an ERISA plan. It does not include the statutorily required components of an ERISA plan. Compare, 29 U.S.C.

§ 1102(b). By its terms, it is an amendment to the Hancock Plan, as set forth in the 1976 Plan Restatement.

The 1976 Restatement contained a Section 8.1 that is, in all material respects, the same as Section 8.1 of the 1995 Plan Restatement. It stated that plan participants whose service was terminated other than by retirement were to receive full pensions beginning at age 65 or, if they elected early retirement, reduced pensions calculated from age 65. RA.23. The pension rights of all long-service employees were made subject to this provision. 1976 Restatement, RA.21, 22-23.

The Court of Appeals held, correctly, that the 1994 Amendment provided no support whatever for the plaintiffs' position. 400 F.3d at 91. It did not amend Article VIII (or Section 8.1) of the 1976 Plan Retirement. By its express terms, it applied only to plan participants who, unlike the plaintiffs, "retire from service." And, it did not alter the Plan provision that made the rights of long-service employees "subject to" Article VIII (and thus Section 8.1). RA.19-20.[4]

This aspect of the decision below is also plainly inappropriate for review by this Court. It turns on the interplay between the particular language of the 1994 Amendment and the 1976 Plan Restatement that it amended. It establishes no legal principle of general

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[4] The 1994 Amendment lowered the age (from 55 to 50) at which certain participants could elect early retirement and broadened the class of persons who could *retire from service* at full benefits before reaching age 65. It did not apply to persons whose employment terminated before they were first eligible for early retirement, and who, therefore, could not "retire from service."

applicability. No conflict of the circuits is, or could be, asserted. It is not challenged in the Petition.

C. The Court Of Appeals Had No Occasion To, And Did Not, Construe The SPD, Which, On Plaintiffs' Interpretation, Is Ambiguous.

In the Court of Appeals, the plaintiffs argued "that SPDs may and should be reviewed to aid in interpreting the meaning of the Pension Plan." Appellees' Br. at 26. They did not assert a separate entitlement to benefits under the SPD. Having found no ambiguity in the Plan, the Court of Appeals had no occasion to consult extrinsic evidence (including the SPD) to aid in the construction of the Plan. 400 F.3d at 89, citing *Bellino v. Schlumberger Tech., Inc.*, 944 F.2d 26, 32 (1st Cir. 1991); Petition, p. 16 n.2.[5]

Moreover, while the terms of the Hancock Plan were clear, the SPD was, on plaintiffs' construction, ambiguous. The SPD was issued in 1991 (A00998-1199), and amended by update brochures issued in 1995 and 1996. A01248-70, A01271-98. At PP-10, the SPD explains the rights of participants who "leave the company before retirement." RA.26. It is undisputed that this description is consistent, in all material respects, with the Hancock Plan itself, as described above. The updates modify other parts of the SPD. They contain the language that plaintiffs quote in the Petition, and upon which they rely. *See* Petition, pp. 19-21. Thus, stating the facts in the light most favorable to the

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[5] The SPD states expressly that it is *not* "the official plan text" and that the official plan text (as distinguished from the SPD) "legally governs the operation of the plan." RA 28.

plaintiffs, the SPD is internally inconsistent. It supports Hancock's position in one location, and plaintiffs' contention in another. The plaintiffs make no attempt to reconcile (and do not ask this Court to reconcile) this alleged inconsistency.

The Court of Appeals did not construe the SPD. Instead, it remanded the case to the District Court for consideration of plaintiffs' theories of recovery that had not previously been addressed by the District Court and were not the subject of the appeal. The consideration of plaintiffs' other claims will involve a construction of, and an opportunity to prove reliance upon, the relevant language in the SPD. Those issues are not ripe for consideration by this Court.

In sum, the Court of Appeals' decision addressed the arguments made by the plaintiffs below, and it correctly rejected them. Each of the issues decided by the Court of Appeals is specific to this case, and each will have little effect on any other case. None is appropriate for further review.

II. The Theories Advanced In Petition Were Not Argued Or Decided In The Court Of Appeals, And, In Any Event, Are Erroneous.

The plaintiffs state that the question presented by their Petition is:

> "Did the First Circuit contravene the Anti-Cutback Statute (29 U.S.C. 1054(g)) and other [unidentified] provisions of ERISA by holding . . . that the District Court committed legal error by considering the plain language of the applicable

> Summary Plan Description in judicially reviewing a plan administrator's decision to deny pension benefits." Petition, p. ii.

The Petition should be denied. It seeks review of issues that were neither argued nor decided in the courts below. The supposed conflict of the circuits relates to matters that were not before the Court of Appeals (or the District Court) and are not ripe for this Court's consideration. Moreover, the arguments now made by the plaintiffs are inconsistent with the plain words of the statutes on which the plaintiffs rely.

A. The Plaintiffs' Argument That A Summary Plan Description Is A Plan Document That Is An Independent Source Of Rights Under Section 1132(a)(1)(B) Was Not Advanced Below And Does Not Present A Conflict Of The Circuits.

The only issue before the Court of Appeals was plaintiffs' claim under 29 U.S.C. § 1132(a)(1)(B). That statute allows a plan participant to recover "benefits due ... *under the terms of his plan* ... or to clarify his rights to future benefits *under the terms of the plan*." (Emphasis supplied.) It does not allow a plaintiff to recover, or to obtain a declaration of rights with respect to, benefits that are not stated in an ERISA plan.

In the Petition, the plaintiffs argue for the first time that the SPD is a "plan document" and thus a source of rights under Section 1132(a)(1)(B). In fact, ERISA distinguishes between a plan and a summary plan description. 29 U.S.C. § 1102 requires that "every employee benefit plan shall be established and maintained pursuant to a written

instrument." 29 U.S.C. § 1102(a)(1). It identifies the features that must be included in every plan instrument and those that may be included in a plan instrument. 29 U.S.C. §§ 1102(b) and (c).

As its name suggests, a Summary Plan Description is a description of the rights afforded by a plan, as stated in the plan instrument; it is not the plan itself. 29 U.S.C. § 1022(a) states that "[a] summary plan description of any employee benefit plan" – not the plan itself – "shall be furnished to participants." The SPD must "reasonably apprise . . . participants . . . of their rights and obligations under the plan." 29 U.S.C. § 1022(a). It must also describe "all plan amendments" at specified times after those amendments are made to the actual plan. 29 U.S.C. § 1024(b).

The plaintiffs did not argue in the courts below that an SPD is a "plan document" that is a source of rights under 29 U.S.C. § 1132(a)(1)(B). In the District Court, consistent with the statutory language, they distinguished between "the plan document" and the SPD. They conceded that if there were a "conflict" between the "plan document," on the one hand, and the SPD, on the other, the plaintiffs would be required to prove reliance on the SPD. *See* p. 4, *supra*.

In the Court of Appeals, the plaintiffs again distinguished between the "plan document" and the SPD. Theirs was a claim for benefits "under the terms of the [Hancock] plan," pursuant to Section 1132(a)(1)(B). They argued that SPDs were an "aid in interpreting the meaning of the Pension Plan," (Appellees' Br. at 26), and that "the District Court did not err in using the updated SPD to inform its reading of the Plan." *Id.* at p. 20. They quoted cases that

state that "SPDs constitute extrinsic evidence of the meaning of the terms of ERISA plans." *Id.* at p. 20, n. 9.[6]

Because the Court of Appeals was not asked to rule that an SPD is a "plan document," or that it was an independent source of rights under Section 1132(a)(1)(B), it did not address that issue. Instead, it concluded that, as a matter of undisputed fact, the 1995 Restatement stated the terms of the Hancock Plan, and it interpreted that document.

This Court has held repeatedly that a writ of certiorari will not be granted with respect to an argument that was not advanced, and an issue that was not decided, in the court below. *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("we do not reach this issue because it was not raised or briefed below"); *Auer v. Robbins*, 519 U.S. 452, 464 (1997) (an "argument [that was] inadequately preserved in the prior proceedings" will not be considered); *Mirce v. DeKalb County, Georgia*, 433 U.S. 25, 34 (1977) (an issue that was not "pleaded, argued nor briefed either

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[6] In the introduction to its argument in the Court of Appeals (Appellees' Br. at 16) the plaintiffs stated that their claim was "based upon the plain language of the October 11, 1994 Pension Plan Amendment, both standing alone and when construed together the Summary Plan Description and other Plan provisions." When the plaintiffs elaborated this argument they made clear that the 1994 Amendment was "the cornerstone for plaintiffs' claims rather than the SPDs . . . " and that the SPD was an "aid in interpreting the meaning" of the plan itself. Appellees' Br. at 19, 26.

Of the thirteen cases cited at pp. 12-14 of the Petition to suggest that other circuits deem SPDs to be "plan documents", only two were cited in the court below. And, one of them, *Matthews v. Sears Pension Plan*, 144 F.3d 461, 468 (7th Cir. 1998), is cited for the proposition that SPDs are "a presumptively reliable guide to the contents of the plan itself."

in the District Court or in the Court of Appeals" will not be considered); *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals"); *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981). ("We do not ordinarily address for the first time in this Court an issue that the Court of Appeals has not addressed); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). There is no reason to depart from that principle in this case.

Moreover, the cases cited in the Petition do not establish that the decision below is in conflict with decisions of other Courts of Appeals with respect to the particular issue that was decided by the Court of Appeals in this case. The Fourth, Seventh, Eighth, Tenth and Eleventh Circuits, like the First Circuit, allow recovery based upon statements in an SPD if the plaintiff establishes that the plaintiff actually relied on a faulty statement in the SPD. *Aiken v. Policy Mgt. Sys. Corp.*, 13 F.3d 138, 141-42 (4th Cir. 1993); *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000); *Koons v. Aventis Pharm. Inc.*, 367 F.3d 768, 775 (8th Cir. 2004); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1598-80 (11th Cir. 1992).

The cases cited in the Petition are not in conflict with these decisions. In three of the cited cases, unlike this case, the SPD was the only document that could constitute an ERISA plan. It was not a summary description of a separate ERISA plan. *Kress v. Food Employers Labor Relations Ass'n*, 391 F.3d 563 (4th Cir. 2004); *Tolson v.*

Avondale Industries, 141 F.3d 604, 609 (5th Cir. 1998); *Neuma Inc. v. AMP Inc.*, 259 F.3d 864, 873 (9th Cir. 2001).[7] The remainder of the cases, unlike this case, were not decided under 29 U.S.C. § 1132(a)(1)(B). *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103 (2nd Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004); *Heidgerd v. Olin Corp.*, 906 F.2d 903 (2nd Cir. 1990); *Burstein v. Retirement Account Plan For Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365 (3rd Cir. 2003); *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243 (6th Cir. 1996).

Finally, it may be that the plaintiffs make the more modest argument that the Court of Appeals erred because it failed to use the SPD as an aid to the construction of the plan instrument itself. Any such argument goes nowhere. The plaintiffs concede that the Court of Appeals left "the door open for [an] SPD to be considered *if* needed to resolve an ambiguity" in a plan. Petition, p. 16, n. 2 (emphasis supplied). However, as the Court of Appeals expressly held, that plaintiffs did not identify any ambiguity in the relevant Plan language. Consequently, there was no reason to consult sources extrinsic to the Hancock Plan to interpret that Plan.

Because the plaintiffs did not argue in the courts below, and those courts did not decide, that the SPD was a "plan document" that is an independent source of rights under Section 1132(a)(1)(B), because the plaintiffs' new argument is inconsistent with the words of the statute, and because there is, in any event, no conflict of the

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[7] *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1569 (11th Cir. 1985) cited in the Petition at p. 14 presents no conflict because the Court held that both the plan and SPD provided the claimed benefit.

circuits with respect to this issue, the Petition should be denied. The Court of Appeals' determination that the words of the Hancock Plan are unambiguous, and its consequent construction of the Plan without resort to extrinsic evidence, is a case-specific determination that is also unworthy of further review by this Court.

B. Plaintiffs' Anti-Cutback Statute Argument Was Not Pressed Below And Is Inapplicable To The Facts Of This Case.

29 U.S.C. § 1054(g) states that an "accrued benefit under an ERISA plan may not be decreased by an amendment of the plan. . . ." The statute thus prohibits the reduction of [1] an *accrued benefit* [2] *under a plan* [3] by a *plan amendment.*

The plaintiffs argue that an SPD is, as a matter of law, a "plan document," and that a plan interpretation by a plan administrator that does not afford a benefit promised in an SPD violates Section 1054(g). This argument suffers from at least five flaws, each fatal.

First, the premise for plaintiffs' argument is that, as a matter of law, an SPD is, or is a part of, an ERISA plan. As noted above, the plaintiffs made no such argument in the courts below, and it is inconsistent with ERISA, which repeatedly distinguishes between plans and SPDs. *See* pp. 16-21, *supra.*

Second, the plaintiffs did not assert a claim of right under Section 1054(g) in the courts below. The Amended Complaint does not allege a violation of Section 1054(g). The only claim that was at issue in the Court of Appeals was the plaintiffs' assertion that they are entitled to

benefits under Section 1132(a)(1)(B). Section 1054(g) is mentioned only twice in the plaintiffs' fifty-nine page appellate brief, and then only for the general proposition that a retirement benefit once granted may not be taken away. Appellees' Br. at 16, 42. As a result, the Court of Appeals had no occasion to address Section 1054(g), and its opinion does not interpret, apply, or reference that statute. Certiorari should not be granted with respect to arguments that were not pressed, and issues that were not decided, in courts below. *See* pp. 18-19, *supra*.

Third, Section 1054(g) does not apply to this case because there was no diminution of an accrued benefit under an ERISA plan. Under all versions of the Hancock Plan, participants whose Hancock service terminated other than by retirement – persons who left Hancock's employ at an age when they were not yet eligible for early retirement – were entitled to retire and receive full benefits upon reaching age 65 or to opt for a reduced early retirement benefit calculated from age 65. As the Court of Appeals held, those rights never changed.*

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* The Petition quotes *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) for the proposition that ERISA is designed to ensure that employees will not be left "empty-handed" once employers have guaranteed them certain benefits. Petition, p. 8. It omits the next following sentence in *Lockheed* in which the Court said that under ERISA, "if a worker has been promised a defined pension benefit upon retirement – *and if he has fulfilled whatever conditions are required to obtain a vested benefit* – he actually will receive it." *Lockheed*, 517 U.S. at 887 (quotation and citation omitted) (emphasis supplied). In this case, at all relevant times, it has been a condition of the benefit claimed by the plaintiffs that a participant be eligible to, and does, retire directly from Hancock Service, *i.e.*, that the participant's Hancock employment does *not* terminate "other than by retirement."

Fourth, Section 1054(g) is inapplicable to this case because it prohibits *plan amendments* that decrease benefits that have accrued under an ERISA plan. Hancock did not amend the Hancock Plan in any way that reduces a benefit to any plan participant. The plaintiffs complained below, and complain in this Court, about a Plan Administrator's *interpretation* of an existing plan. A Plan Administrator's construction of an ERISA plan is not an amendment of a plan. It is in the nature of an adjudicatory decision that is challengeable under Section 1132(a)(1)(B), and that, if erroneous, may be reversed by a court.

Fifth, the plaintiffs' argument is inconsistent with this Court's decision in *Firestone Tire & Rubber Co.*, 489 U.S. at 113-15. Even if the SPD were a "plan document," the 1995 Restatement of the Hancock Plan was also a "plan document." The Hancock Plan, as set forth in the 1995 Restatement, granted the Plan Administrator discretionary authority to construe and apply the Hancock Plan. 400 F.3d at 90. *Firestone* establishes that, in these circumstances, the Plan Administrator's interpretation is to be reviewed under an arbitrary and capricious standard. However, if a plan administrator's plan interpretation could be characterized as a "plan amendment," every denial of benefits could be argued to be a violation of Section 1054(g), and every denial of benefits would then present an issue of law subject to *de novo* review. *Firestone* notwithstanding, plan administrators' plan interpretations would never be reviewed under an arbitrary and capricious standard.

In sum, plaintiffs' argument was not pressed in, or addressed by, the Court below. Moreover, Section 1054(g) is plainly inapplicable to a dispute over a plan administrator's interpretation of a plan. A writ of certiorari should not be granted.

C. There Is No Conflict Within The First Circuit.

The petitioners argue that there is an intra-First Circuit conflict between the decision in this case and that in *Glista v. UNUM Life Ins. Co.*, 378 F.3d 113 (1st Cir. 2004).

There is no conflict between *Glista* and the present case. *Glista* addresses a claim for disability benefits. The relevant insurance policy precluded the payment of benefits resulting from "pre-existing conditions." The plaintiff had manifested symptoms of the condition that resulted in his disability before the commencement of his employment, but the condition was not accurately diagnosed until after he was first employed. Prior to the events at issue, the plan administrator established internal guidelines to be used in determining whether the pre-existing condition exclusion applied. However, the plan administrator failed to apply its own pre-established decisional criteria to the facts of plaintiff's claim.

The court analogized the internal guidelines to administrative agency regulations or guidelines implementing a statute. 378 F.3d at 122. It ruled that they should be considered when applying a plan provision of uncertain scope to the facts of an individual case. The Court declined to adopt "hard-and-fast rules." It said that the disposition of issues of this type "will vary with the facts of each case." *Id.* at 114, 123.

By contrast, in the present case, the Hancock Plan states the benefit to be provided to a well-defined, objectively determinable subclass of plan participants – those whose Hancock Service terminated other than by retirement. The language of the Plan is unambiguous. The facts

are undisputed. The plaintiffs' Hancock Service terminated other than by retirement. There were no internal guidelines or other decisional criteria comparable to those in *Glista*, and none were needed.[9] Therefore, this case is completely distinguishable from *Glista*.

In any event, the existence of an intra-circuit split, if a split were to exist, would not constitute a ground upon which a writ of certiorari is ordinarily granted. *Taylor v. United States*, 493 U.S. 906 (1989) (a conflict within a circuit does not warrant certiorari); *Davis v. United States*, 417 U.S. 333, 340 (1974). "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). Stern, Gressman, Shapiro and Geller, *Supreme Court Practice*, (8th ed. 2002), § 4.6, p. 235.

D. The Alleged Conflict Of The Circuits Relating To Reliance On A Summary Plan Description Relates To An Issue That Was Not Considered In The Courts Below And Is Not Ripe For Consideration By This Court.

The plaintiffs argue that there is a conflict of the circuits regarding the question whether reliance on an SPD must be proven when the SPD states that a benefit is available, but the benefit is not, in fact, provided by the

[9] It is also undisputed that Hancock's application of the terms of the Hancock Plan to the plaintiffs was consistent with its earlier application of the same plan provision to other similarly situated plan participants. PA. 35a.

underlying plan.[10] Whatever may be the merits of that argument, it is irrelevant to the instant Petition.

The plaintiffs did not contest, at any stage of this case, the First Circuit's requirement that reliance on a statement in an SPD be proven before a plaintiff may recover a benefit that is not actually provided in the underlying plan. As a result, the District Court's opinion does not address that issue, and the Court of Appeals merely restated settled and unchallenged First Circuit precedent. 400 F.3d at 88. Indeed, in their brief in the Court of Appeals, the plaintiffs argued that the issue of reliance was relevant only to issues that were *not* before the Court. *See* pp. 6-7, *supra*. A writ of certiorari should not be granted with respect to an issue that has not been argued, and was not decided, in the courts below. *See* p. 18-19, *supra*.

Moreover, the Petition asks the Court to determine whether the First Circuit's decision in this case contravenes the Anti-Cutback Statute, 29 U.S.C. § 1054(g). The cases that are said to create the conflict of the circuits (Petition, pp. 24-25) were not decided under the Anti-Cutback Statute.

Further, this issue may never be reached in this case. The plaintiffs assert that they will prevail in the remand

[10] The rule in the First Circuit and several other circuits is premised on the view that the ERISA plan states the benefits to which plan participants are entitled. If an SPD misdescribes the terms of the plan, a plaintiff may not recover a benefit that is not provided in the plan unless the plaintiff demonstrates that he relied on the misdescription in some way that resulted in harm to the plaintiff. This analysis was first articulated in the First Circuit by then Judge, now Justice, Breyer. *Govoni*, 732 F.2d at 252; *see also Bachelder* 837 F.2d at 522-23

proceedings, because they will prove that they relied to their detriment on the statements in the SPD that (they state) support their position. If the plaintiffs are correct, the issue as to which the asserted conflict exists will be irrelevant. If the plaintiffs fail to prove reliance, if the plaintiffs challenge the First Circuit's requirement that reliance be proved, and if the case ultimately turns on that dispute, the issue may be confronted on a developed record, and will have been addressed below. In the present context, the plaintiffs' argument presents an abstract question for consideration on an undeveloped record. It is not ripe for review by this Court. Accordingly, the Petition should be denied. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) ("we generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967) (" . . . because the Court of Appeals remanded this case, it is not yet ripe for review by this Court") (Scalia, J.)

CONCLUSION

The decision of the Court of Appeals was correct. Nothing in the Court's opinion warrants further review. For that reason, the plaintiffs have advanced arguments that were not made below, and are not now ripe for review. Their new arguments are, moreover, erroneous. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: August 15, 2005

29 U.S.C. § 1022

§ 1022. Summary plan description

(a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(b) The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 1191b(a)(1) of this title), whether a health insurance issuer (as defined in section 1191b(b)(2) of this title) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions

providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this chapter and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 1191b(a)(1) of this title) and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

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29 U.S.C. § 1024(b)

§ 1024. Filing and furnishing of information

* * *

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and

all modifications and changes referred to in section 1022(a)(1) of this title –

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a) of this title (other than a material reduction in covered services or benefits provided in the case of a group health plan (as defined in section 1191b(a)(1) of this title)), a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan. If there is a modification or change described in section 1022(a) of this title that is a material reduction in covered services or benefits provided under a group health plan (as defined

in section 1191b(a)(1) of this title), a summary description of such modification or change shall be furnished to participants and beneficiaries not later than 60 days after the date of the adoption of the modification or change. In the alternative, the plan sponsors may provide such description at regular intervals of not more than 90 days. The Secretary shall issue regulations within 180 days after August 21, 1996, providing alternative mechanisms to delivery by mail through which group health plans (as so defined) may notify participants and beneficiaries of material reductions in covered services or benefits.

(2) The administrator shall make copies of the latest updated summary plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material (including the percentage determined under section 1023(d)(11) of this title) as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the

latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

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29 U.S.C. § 1054(g)

§ 1054. Benefit accrual requirements

* * *

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of –

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy. The Secretary of

the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any –

(A) tax credit employee stock ownership plan (as defined in section 409(a) of Title 26), or

(B) employee stock ownership plan (as defined in section 4975(e)(7) of Title 26),

shall not be treated as failing to meet the requirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.

(4) (A) A defined contribution plan (in this subparagraph referred to as the "transferee plan") shall not be treated as failing to meet the requirements of this subsection merely because the transferee plan does not provide some or all of the forms of distribution previously available under another defined contribution plan (in this subparagraph referred to as the "transferor plan") to the extent that

(i) the forms of distribution previously available under the transferor plan applied to the account of a participant or beneficiary under the transferor plan that was transferred from the transferor plan

to the transferee plan pursuant to a direct transfer rather than pursuant to a distribution from the transferor plan;

(ii) the terms of both the transferor plan and the transferee plan authorize the transfer described in clause (i);

(iii) the transfer described in clause (i) was made pursuant to a voluntary election by the participant or beneficiary whose account was transferred to the transferee plan;

(iv) the election described in clause (iii) was made after the participant or beneficiary received a notice describing the consequences of making the election; and

(v) the transferee plan allows the participant or beneficiary described in clause (iii) to receive any distribution to which the participant or beneficiary is entitled under the transferee plan in the form of a single sum distribution.

(B) Subparagraph (A) shall apply to plan mergers and other transactions having the effect of a direct transfer, including consolidations of benefits attributable to different employers within a multiple employer plan.

(5) Except to the extent provided in regulations promulgated by the Secretary of the Treasury, a defined contribution plan shall not be treated as failing to meet the requirements of this subsection merely because of the elimination of a form of distribution previously available thereunder. this paragraph shall not apply to the elimination of a form of distribution with respect to any participant unless

(A) a single sum payment is available to such participant at the same time or times as the form of distribution being eliminated; and

(B) such single sum payment is based on the same or greater portion of the participant's account as the form of distribution being eliminated.

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29 U.S.C. § 1102

§ 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall –

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide –

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

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29 U.S.C. § 1132

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) of this section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

[Excerpted Provisions of the
1995 Restatement of the Hancock Plan]

THE JOHN HANCOCK
MUTUAL LIFE INSURANCE COMPANY

PENSION PLAN

ARTICLE I

DEFINITIONS

1.4 "Employee" shall mean any person employed as a common law employee on a salaried basis or as a

Marketing Representative, Sales Manager or Agency Manager by

(A) the Company, or

(B) a Participating Subsidiary or Affiliated Corporation, provided that any person employed by a Foreign Subsidiary or Affiliated Corporation shall be considered an employee only if: (1) he is a citizen of the United States, and (2) the Company has entered into an agreement under section 3121(1) of the Code applicable to such Foreign Subsidiary or Affiliated Corporation.

1.5 "Participant" shall mean any Employee who becomes a Participant in the Plan in accordance with Article U and who is entitled to any benefit under the Plan. "Class A Participant" shall mean a Participant who is a Marketing Representative. "Class B Participant" shall mean a Participant other than one who is Marketing Representative, and shall, unless otherwise stated, include a Participant who is a Ford Group Office Clerical Employee.

* * *

1.10 (A) "Service" shall mean, for all purposes of the Plan, all periods of employment, whether or not such employment is continuous, as an Employee or as a salaried employee of a predecessor employer, prior to his Actual Retirement Date.

* * *

1.12 "Normal Retirement Date" for a Participant shall mean the first day of the month in which he attains age sixty-five (65), or the first day of the month following the Participant's completion of five (5) Years of Service, whichever is later.

1.13 "Early Retirement Date" for a Participant shall mean the date on which he retires in accordance with Section 3.2.

* * *

ARTICLE III

RETIREMENT DATES

3.1 Subject to the following Sections of this Article, each Participant shall retire on his Normal Retirement Date.

3.2

* * *

(B) For Class B Participants other than Ford Group Office Clerical Employees, on and after the first day of the month in which any such Participant attains age fifty (50), he may retire on the first day of any month prior to his Normal Retirement Date provided:

(1) he has completed fifteen (15) Years of Service on the first day of the month in which he attains age fifty (50); or

* * *

ARTICLE IV

AMOUNT OF PENSION

4.1 The yearly amount of the Pension payable to a Participant commencing on an Actual Retirement Date on or after his Normal Retirement Date shall, subject to any applicable Sections of this Article and Articles V, VIII and IX,

* * *

(B) in the case of a Class B Participant be equal to the sum of

(1) 1.43% times Years of Service (not to exceed thirty [30] years) times Final Average Salary not in excess of Covered Compensation,

(2) 1.80% times Years of Service (not to exceed thirty [30] years) times Final Average Salary in excess of Covered Compensation, and

(3) 1% of the sum of (1) and (2) for each Year of Service in excess of thirty [30] Years of Service.

4.2

* * *

(B) In the case of a Class B Participant, other than a Ford Group Office Clerical Employee, who is either an Employee or a Transferred Participant (a) who has attained the first day of the month in which his sixtieth (60th) birthday occurs and whose age in years and completed months plus his Years of Service equals at least eighty-five (85), or (b) who has attained the first day of the month in the ten-year period prior to his Social Security Normal Retirement Age and whose Years of Service equals as least twenty-five (25), the yearly amount of Pension payable commencing on his Early Retirement Date shall, subject to any applicable Sections of this Article and Articles V, VIII and IX, be equal to the sum of (1) and (2) below in the case of an Employee, and to (1) below in the case of a Transferred Participant.

(1) The yearly amount of Pension which would be payable to him under Section 4.1 if his Early Retirement Date were his Normal Retirement

Date, but computed on the basis of his Compensation and Service prior to his Early Retirement Date;

(2) A temporary Pension payable:

(a) in the yearly amount of $3,000 until the first day of the month in which the Participant is first eligible for a Social Security Retirement Insurance Benefit, or would have been eligible absent his entitlement to the Social Security Disability Insurance Benefit, whether or not the Participant makes application for such Social Security, Retirement Insurance Benefit or Social Security Disability Insurance Benefit, and

(b) in the yearly amount of 51,620 from the date he is or would have been eligible, as described in (a) above, for a Social Security Retirement Insurance Benefit, until his Normal Retirement Date;

provided that, if on his Early Retirement Date, such a Participant (other than a Participant who had been receiving Accident and Sickness Weekly Indemnity under the John Hancock Mutual Life Insurance Company Employee Welfare Plan, or Salary Continuance Payments, during a disability leave of absence for a period of less than six (6) months and who elects an Early Retirement Date which is not later than six (6) months after the date on which such Accident and Sickness Weekly Indemnity or such Salary Continuance payments commenced) is eligible for Social Security Disability Insurance Benefits, the amount described in (2) shall not be payable to him; and further provided that if, prior to his Normal Retirement Date, such

Participant becomes ineligible for Social Security Disability Insurance Benefits because of improved health and submits to the Company satisfactory evidence of such ineligibility, the amount described in (2) shall be payable for the period prior to his Normal Retirement Date during which he is ineligible for Social Security Disability Insurance Benefits.

4.3

* * *

(B) The yearly amount of Pension payable to a Class B Participant, other than a Ford Group Office Clerical Employee, who is not entitled to the Pension described in Section 4.2(B) shall be equal to the yearly amount of Pension which would be payable to him if his Early Retirement Date were his Normal Retirement Date reduced by an early retirement reduction factor for each month by which his Early Retirement Date precedes (i) the date on which he would have qualified for the Pension described in Section 4.2(B) if he had continued in Service until such date, or until his Normal Retirement Date, whichever date is earlier, in the case of a Participant who was in Service immediately prior to his Early Retirement Date, or (ii) his Normal Retirement Date, in the case of a Participant who terminated front Service prior to his Early Retirement Date. The early retirement reduction factor for a Participant who is a Highly Compensated Employee on his Early Retirement Date shall be 0.4% for each month during the ten-year period immediately preceding his Social Security Normal Retirement Age and 0.633% for each month by which his Early Retirement Date precedes that ten-year period. The early retirement reduction

factor for all other Participants is 0.4% for each month.

* * *

ARTICLE VIII

BENEFITS ON TERMINATION OF SERVICE, DEATH OR RETURN TO EMPLOYMENT

8.1 If the Service of a Participant who has completed at least five (5) Years of Service is terminated, other than by retirement, such Participant will, subject to Article V, be entitled to receive

(A) a yearly amount of Pension determined in accordance with Section 4.1A commencing on the first day of the month in which he attains age sixty five (65), or

(B) the Pension described in (A) above subject to a reduction as described in Section 4.3, commencing on the first day of any month on or after the month in which he meets any of the requirements for Early Retirement described in Section 3.2.

* * *

ARTICLE XI

ADMINISTRATIVE AND FIDUCIARY PROVISIONS

11.1 The Company shall be the named fiduciary and the administrator of the Plan for purposes of ERISA and shall have the authority to control and manage the operation and administration of the Plan. The Company shall have the power to adopt such rules and regulations as it may deem necessary or appropriate

for the efficient operation and administration of the Plan. Such rules and regulations shall be in writing and shall be consistent with the terms of the Plan, the group annuity contracts issued under the Plan, any trust established in accordance with Section 10.1, and the requirements of ERISA. The Company shall interpret the Plan and determine all questions arising under it. Any such determination by the Company shall be binding on all persons affected thereby.

The Company shall pay the costs of administering the Plan, including, but not limited to, the fees of the Trustee and may, in its discretion, pay any fees arising out of or incidental to particular investments held in trust under the Plan. Each Participating Subsidiary or Affiliated Corporation may be required to share in such cost as determined by the Company.

[1994 Amendment to the Hancock Plan]

John Hancock Mutual Life Insurance Company
Boston, Massachusetts

VOTE OF COMPENSATION COMMITTEE

Meeting of October 11, 1994

VOTED, that the John Hancock Mutual Life Insurance Company Pension Plan, as restated by the Vote of December 8, 1975, and subsequently amended, be further amended effective January 1, 1995, subject to such regulatory approval as is necessary and to such changes of a technical nature as the Chairman of the Board or the President shall deem necessary to obtain such approval, for Class B Participants, other than Ford Group Office clerical employees, who retire from service on or after January 1, 1995, to provide as follows:

1 Section 3.2, relating to Early Retirement Dates, is amended with respect to Class B Participants, other than Ford Group Office clerical employees, to provide that in addition to the current early retirement provisions, that on and after the first day of the month in which a Participant attains age fifty (50) he may retire on the first day of any month prior to his Normal Retirement Date provided he has completed fifteen (15) Years of Service.

2 Section 4.4(A), relating to the amount of Early Retirement Pension Benefits, is amended with respect to Class B Participants, other than Ford Group Office clerical employees, to provide that in addition to the current unreduced early retirement provisions, that such a Participant who has attained the first day of the month in the ten year period prior to his Social Security Normal Retirement Age and whose Years of Service equal at least twenty-five (25), shall be entitled to a Pension payable commencing on his Early Retirement Date in an amount equal to the sum of (a)

the yearly amount of Pension which would be payable to him under Sections 4.1, 4.2 or 4.3, whichever would be applicable to him, if his Early Retirement Date were his Normal Retirement Date, but computed on the basis of his Compensation and Service prior to his Early Retirement Date, plus (b) the temporary Pension described in Section 4.4(B), if applicable.

3 Section 4.5, relating to Early Retirement reduction factors, is amended with respect to Class B Participants, other than Ford Group Office clerical employees, to provide that the yearly amount of Pension payable to any such Participant who is not entitled to the Pension described in Section 4.4, shall be equal to the yearly amount of Pension which would be payable to him if his Early Retirement Date were his Normal Retirement Date, reduced by an early retirement reduction factor for each month by which his Early Retirement Date precedes the date on which he would have qualified for the Pension described in Section 4.4 if he had continued in Service until such date, or until his Normal Retirement Date, whichever date is earlier. The early retirement reduction factor for a Participant who is a Highly Compensated Employee on his Early Retirement Date shall be 0.4% for each month during the ten year period immediately preceding his Social Security Normal Retirement Age and 0.633% for each month by which his Early Retirement Date precedes that ten year period. The early retirement reduction factor for all other Participants is 0.4% for each month.

/s/ _____
Vice President, Counsel
and Secretary

[Excerpted Provisions of the
1976 Restatement of the Hancock Plan]

PENSION PLAN

for Employees of the

JOHN HANCOCK
MUTUAL LIFE INSURANCE COMPANY

As amended through

January 1, 1976

* * *

ARTICLE IV

AMOUNT OF PENSION

* * *

4.4 In the case of a Participant who is either an Employee or a Transferred Participant (a) who has attained the first day of the month in which his sixtieth birthday occurs and whose age in years and completed months plus his Years of Service equals at least eighty-five, or (b) who is a Class B Participant and has completed forty Years of Service, the yearly amount of Pension payable commencing on his Early Retirement date shall, subject to any applicable Sections of this Article and Articles V, VIII and IX, be equal to the sum of (A) and (B) below in the case of an Employee, and to (A) below in the case of a Transferred Participant.

(A) The yearly amount of Pension which would be payable to him under Section 4.1, Section 4.2, or Section 4.3, whichever would be applicable to him, if his Early Retirement Date were his Normal Retirement Date, but computed on the basis of his Compensation and Service Prior to his Early Retirement Date;

(B) A temporary Pension payable

(1) in the yearly amount of $3,000 until the first day of the month in which the Participant is first eligible for a Social Security Retirement Insurance Benefit, or would have been eligible absent his entitlement to the Social Security Disability Insurance Benefit, whether or not the Participant makes application for such Retirement Insurance Benefit, and

(2) in the yearly amount of $1,620 from the date he is or would have been eligible, as described in (1) above, for a Social Security Retirement Insurance Benefit, until his Normal Retirement Date;

provided that, if on his Early Retirement Date a Participant (other than a Participant who had been receiving Accident and Sickness weekly indemnity under the Company's Group Insurance Plan or Salary Continuance payments during disability leave of absence for a period of less than six months and who elects an Early Retirement Date which is not later than six months after the date on which such Accident and Sickness weekly indemnity or such Salary Continuance payments commenced) is eligible for Social Security Disability Benefits, the amount described in (B) shall not be payable to him; and further provided that if, prior to his Normal Retirement Date, such Participant becomes ineligible for Social Security Disability Benefits because of improved health and submits to the Company satisfactory evidence of such ineligibility, the amount described in (B) shall be payable for the period prior to his Normal Retirement Date during which he is ineligible for Social Security Disability Benefits.

4.5 The yearly amount of Pension payable commencing on his Early Retirement Date to a Participant who is not entitled to the Pension described in Section 4.4, shall, subject to any applicable Sections of this Article

and Articles V, VIII, and IX, be equal to the yearly amount of Pension which would be – payable to him under Section 4.1, Section 4.2 or Section 4.3, whichever would be applicable to him, if his Early Retirement Date were his Normal Retirement Date, reduced by ½ of 1% for each month by which his Early Retirement Date precedes (a) the date on which he would have qualified for the Pension described in Section 4.4 if he had continued in Service until such date, or until his Normal Retirement Date, whichever date is earlier, in the case of a Participant who was in Service immediately prior to his Early Retirement Date, or (b) his Normal Retirement Date, in the case of a Participant whose Service terminated prior to his Early Retirement Date.

* * *

ARTICLE VIII

BENEFITS ON TERMINATION OF SERVICE OR DEATH

8.1 If the Service of a Participant who has completed at least ten Years of Service is terminated, other than by retirement, such Participant will, subject to Article V, be entitled to receive commencing

(A) on the first day of the month in which he attains age 65, a yearly amount of Pension determined in accordance with Sections 4.1, 4.2, or 4.3, or

(B) on the first day of any month on or after the month in which he meets any of the requirements for early retirement described in Section 3.2, the Pension described in (A) above subject to a reduction of one-half of one percent per month for each month by which the date so elected precedes the date in (A) above.

If a Participant who is receiving a Pension under the terms of this Section subsequently resume Service prior to the first day of the month in which he attains age 65, he shall not be entitled to receive any such Pension subsequent to the date his Service is resumed. Upon the termination of such Service his Pension shall be recomputed on the basis of his Service in accordance with Article IV or this Section, whichever is appropriate. No repayment shall be required of any Pension received under the terms of this Section.

[Excerpted Provisions of the
1991 Summary Plan Description]

YOUR BENEFITS PROGRAM

Reflecting Changing Needs

About "Your Benefits Program" Booklet . . .

"Your Benefits Program" booklet has been completely revised to provide you with more information about your benefits program. Benefit summaries, charts and examples have been added to make the various coverages easier to understand. We have incorporated all benefit changes through January 1, 1991.

This booklet has a new look. We are now using a "bound" version rather than a loose leaf binder. While a notebook style of booklet can be easier to update by inserting new pages, it is often difficult to know whether you have all of the right pages. Each year you will receive an update to this booklet describing all of the benefit changes that have been made since the booklet was published. You will always know that you have the most current published information.

Pockets on the front and back covers can be used to store your annual booklet update, annual benefits statement, Flex Plan confirmation notices or even blank claim forms for your future use.

As this booklet was designed to meet your needs in understanding how your benefits work, we are interested in your feedback. In the front pocket of this booklet, you will find a single-page Benefits Information Feedback form that you may use at any time to let us know about additional information that you would find useful. Later this year, you will receive a short survey on how you used your

new booklet in determining your benefit choices for the 1992 Flex Plan year.

Our stated goals for our benefits program are to provide above average benefits in comparison to our competitors, and to pay the majority of the cost for those benefits. After you read your booklet, we hope that you will agree that we are meeting these very important goals.

October 1991

* * *

PP-10

If You Leave the Company (Vesting)

If you leave the company for any reason other than retirement after you have completed four years and five months of service, you earn a guaranteed right to your pension benefit. This is known as being vested in the Pension Plan.

If you leave the company before retirement and you are vested, you will receive your full pension income when you reach your normal retirement date. If you wish, you may receive a reduced pension earlier – as soon as you would have qualified for early retirement at age 55 or later. (See "Early Retirement," "Reduced Pension Benefit Example," on page PP-6.)

If you should die after you become eligible to retire, but before you begin to receive your pension benefit, your spouse may be eligible to receive a survivor's benefit from the Pension Plan. (Please see "Survivors' Benefits Before Retirement," on page PP-9 for details.)

If you have less than four years and five months of service when you leave the company, neither you nor your spouse will receive any benefit from the Pension Plan.

Other Information

Taxes and Your Pension

Pension income is considered taxable income by the Internal Revenue Service (IRS). When you retire you can elect whether or not to have the appropriate taxes withheld directly from your pension checks.

When a Benefit Is Not Payable

You or your beneficiary will not be eligible to receive a benefit from the plan if you:

> leave the company before you have become vested (see "If You Leave the Company (Vesting)," on this page), or

> die before you become vested

If you retire and begin receiving a pension and then return to work for the company other than as a part-time employee (and are under age 70½), you will not be eligible to receive a benefit from the plan. Your pension will begin again, however, when you stop working. Special rules apply once you reach age 70½. (See "If You Work Past Age 65," page PP-4.)

Assignment of Your Benefit

Under most conditions, your plan benefit is nontransferable. It may not be sold, used as collateral for a loan, given away or otherwise assigned. Also, creditors may generally not attach, garnish or otherwise interfere with your benefit.

Special procedures apply, however, if a state domestic relations or divorce court issues a qualified domestic

relations order as defined under the Retirement Equity Act and the Internal Revenue Code, relating to your plan benefit. This order must specify who is to receive all or part of your benefit under the plan. Such a judgment must:

> relate to the provision of child support, alimony payments or marital property rights;

> be made according to a state domestic relations law; and

> contain specific information required by the Retirement Equity Act.

* * *

PP-12

For more information on the PBGC insurance protection and its limitations, ask your plan administrator or contact the PBGC. Inquiries to the PBGC should be addressed to:

Office of Communications, PBGC
2020 K Street, N.W.
Washington, D.C. 20006

The PBGC Office of Communications may also be reached by calling (202) 778-8840.

Plan Documents

This summary describes only the highlights of your company's Pension Plan and does not attempt to cover all details. Full details are provided in the official plan text, which legally governs the operation of the plan. These documents, as well as the required reports of plan operations and plan descriptions as filed with the U.S. Department of Labor, are available for review through the Director of Benefit Communications, Human Resources,

T-18, during normal working hours. Upon written request to the company, copies of any of these documents will be furnished within 30 days, at a nominal cost, to any plan participants or persons receiving plan benefits.

In the Future

John Hancock expects and intends to continue the Pension Plan indefinitely, but reserves the right to amend or terminate it at any time. Of course, no change will be made that would deprive you of a benefit you've already earned.

(1)

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SUPREME COURT, U.S.

No. 05-80

IN THE

Supreme Court of the United States

EILEEN CHEEVER; ANTHONY COSTANZO; MARY ANN DIEBOLD; ROSEMARY GIBSON; EDITH NEIL; MARILYN NUSS; SUSAN OIKELMUS,
PETITIONERS

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, as the Administrator of the John Hancock Mutual Life Insurance Company Pension Plan,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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Petitioners file this short reply brief to respond to three new issues raised in the opposition brief, two substantive and the third purely procedural.

SUMMARY

First New Substantive Argument. Hancock argues that, while the Anti-Cutback Statute prohibits formal plan amendments that have the effect of rescinding accrued pension benefits, it does **not** apply where (as here) accrued benefits are rescinded under the guise of a post-accrual reinterpretation of the plan. However, this would render nugatory the Anti-Cutback Statute.

Second New Substantive Argument. Hancock argues that the SPDs must be disregarded on judicial review, because Petitioners did not demonstrate that the underlying (i.e., undistributed) plan document was facially ambiguous. However, this would strip reviewing courts of the ability to meaningfully assess whether the plan administrator acted reasonably.

New Procedural Argument. Hancock argues that certain aspects of the Question Presented were not preserved below, and are otherwise not ripe for resolution. However, the record demonstrates that each of the challenged arguments was either made by Petitioners to the First Circuit, or raised by the First Circuit itself, both of which suffice for further review in this Court. Moreover, established law-of-the-case principles make the issues ripe for immediate resolution.

REPLY

A. ERISA's Anti-Cutback Statute Prohibits Post-Accrual Plan Reinterpretations That Have The Effect Of Rescinding Accrued Pension Benefits.

The Anti-Cutback Statute prohibits "a plan amendment which has the effect of – (A) eliminating or reducing an early retirement benefit." 29 U.S.C. 1054(g)(1)(A). In opposing certiorari, Hancock argues that the Anti-Cutback does not apply because (*inter alia*) there was no formal "plan amendment" sufficient to trigger its provisions. Opp. Br. at 23. Instead, Petitioners' early retirement benefits were rescinded under the guise of a post-accrual reinterpretation of the Plan (albeit one that conflicted with the interpretation set forth in the SPDs in effect at the time of accrual).

This form-over-substance construction would render nugatory the Anti-Cutback Statute, in conflict with *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004). In *Cent. Laborers'*, the Court carefully analyzed the Anti-Cutback Statute and held that it "flatly prohibits plans from attaching new conditions to benefits that an employee has already earned," or imposing a "new condition . . . after a benefit has accrued." *Id.* at 746-47.[1] The Court based its holding, in part, on an IRS regulation providing that "the addition of . . . objective conditions with respect to a . . . protected benefit that has already accrued violates [the Anti-Cutback Statute]." *Id.* at 747, *citing* 26 CFR § 1.411(d)-4, A-7.

Hancock's reading conflicts with the foregoing, and

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[1] Because this protection goes to the heart of ERISA, *Cent. Laborers'* rejected a proposed narrow construction of the Anti-Cutback Statute that would have had the effect of taking away or reducing the value of accrued benefits. *Id.* at 749-50.

would create a loophole so large as to swallow the Anti-Cutback Statute and seriously undermine the core purpose of ERISA to ensure that "if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he will actually receive it." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980).

Outside of ERISA, new interpretations that are the equivalent of amendments are routinely treated as such. *See, e.g., NLRB v. Dennison Mfg. Co.*, 419 F.2d 1080, 1084 (1st Cir. 1969), *cert. denied*, 397 U.S. 1023 (1970) ("broad interpretation" of administrative complaint constituted an improper amendment); *Novak d/ba Pets Warehouse and Petswarehouse.Com v. Overture Services, Inc.*, 309 F. Supp. 2d 446, 453 (E.D. N.Y. 2004) ("Plaintiff's new and novel reinterpretation of the first count is tantamount to an *ad hoc* amendment of the complaint."); *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp 698, 737 (1997) ("When an agency announces a new interpretation of a regulation that effectively repudiates or substantially departs from the agency's previous interpretation of that same rule, that action is tantamount to an amendment of the rule itself ...").

While this precise issue has not been addressed in a published ERISA decision, in an on-point unpublished decision the Fourth Circuit held that a new interpretation that has the effect of amending a pension plan's early retirement provisions would violate the Anti-Cutback Statute:

> The Plan has little or no incentive to abandon its current position concerning the effect of the resolution. An **interpretation** such as Martin espouses would cause the

> Plan to be in violation of ERISA's anti-cutback provisions and would jeopardize the Plan's tax qualified status under Section 401 of the Internal Revenue Code. [Emphasis added.]

Martin v. Board of Trustees, Sheet Metal Workers' Nat'l Pension Fund, No. 95-2413, 1996 U.S. App. LEXIS 16420 at ** 6-7 (4th Cir. July 10, 1996) (confirming entitlement to early retirement benefits based on years of service).

B. Under ERISA, Reviewing Courts May Consider The Relevant SPDs Even When The Underlying Plan Document Is Not Facially Ambiguous.

This Petition concerns judicial review of a claim for withheld pension benefits under 29 U.S.C. § 1132(a)(1)(B). Where (as here) the plan administrator had discretionary authority to interpret the plan, Section 1132(a)(1)(B) establishes "reasonableness" as the standard of review:

> In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 . . . (1989), the Supreme Court held that 'a denial of benefits challenged under [29 U.S.C.] § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator . . . discretionary authority . . . to construe the terms of the plan.' . . . The court has defined the *Firestone* deferential standard as one of 'reasonableness.' [Citations.]

Wagener v. SBC Pension Benefit Plan – Non Bargained Program, 407 F.3d 395, 402 (D.C. Cir. 2005) (claim stated where alleged interpretation of plan administrator was

unreasonable).

Various factors have emerged for assessing reasonableness under Section 1132(a)(1)(B), including whether the challenged decision was "(a) as a result of reasoned and principled process (b) consistent with any prior interpretations by the plan administrator (c) reasonable in light of any external standards and (d) consistent with the purposes of the plan." *Fought v. UNUM Life Ins. Co.*, 379 F.3d 997, 1003 (10th Cir. 2004), *cert. denied*, 125 S.Ct. 1972, *quoting* Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases*, 50 AM. U.L. REV. 1083, 1135, 1172 (2001).

To meaningfully apply these factors, the record must include the relevant SPD, which (*inter alia*) provides evidence as to whether the challenged decision is "consistent with any prior interpretations by the plan administrator." *Id.* Without the SPDs, the reviewing court would be left in the dark, without any context for fairly adjudicating the plan administrator's conduct.

In opposing certiorari, Hancock argues that the SPDs constitute "extrinsic evidence" that may only be reviewed in those rare cases where the underlying (i.e., undistributed) plan document is held to be ambiguous on its face. Opp. Br. at 14, 20.[2] In all other cases, the underlying plan document must be construed in a vacuum, without reference to the relevant SPDs.

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[2] Hancock notes the First Circuit's finding that Petitioners failed to demonstrate an ambiguity in the underlying plan document. Op. Br. at 20. However, the record demonstrates precisely the contrary, as will be shown during merits briefing. Moreover, the District Court and First Circuit rendered precisely opposite constructions of the underlying plan document, which testifies to the ambiguity and to the need for a complete judicial review record – especially including the relevant SPDs.

However, this would render judicial review meaningless in most cases, because reviewing courts would lack a record for assessing whether the plan administrator acted reasonably.

The SPDs tether plan administrators to their past, and stop them (as occurred here) from taking back their promises with impunity. For this reason – and also because they qualify as "plan documents," *see* Pet. Br. at 10-12, – SPDs constitute neither "extrinsic evidence" (in the words or Hancock) nor "extraneous documents" (in the words of the First Circuit).

C. The Question Presented Was Properly Preserved And Is Ripe For Review.

Hancock also opposes certiorari on procedural grounds, arguing that Petitioners failed to preserve certain aspects of the Question Presented for further review in this Court. *See, e.g.*, Opp. Br. at 16 (whether SPDs are "plan documents"), 21 (whether the Anti-Cutback Statute applies), 26 (whether "reliance" issue is ripe). In making this argument, however, Hancock presents an incomplete description of the record and the governing law, as shown below.

1. The "Plan Document" Issue Was Raised By The First Circuit.

Throughout this case, Petitioners have argued that the SPDs accurately describe the Plan, that Hancock is bound by the SPDs, and that the reviewing courts should consider the SPDs – which Hancock reluctantly admits: "[Petitioners] asserted [below] . . . that their interpretation of the of the 1994 Amendment was 'confirmed' by the language of the SPDs . . . [and that] 'the SPDs may and should be reviewed to aid in interpreting the meaning of the Pension Plan.'" Opp. Br.

at 6 (quoting Petitioners). Notwithstanding, Hancock argues that the precise sub-question whether SPDs constitute "plan documents" was not adequately preserved. Opp. Br. at 16-19.

This argument may be quickly rejected, for one straightforward reason: the First Circuit itself raised the "plan document" issue by holding that SPDs are "extraneous documents." *See* App. 10a ("With the governing [underlying] plan document identified, extraneous documents [including the SPDs] are irrelevant to our determination of the former employees' right to relief under Count I.") As already briefed, this is a radical departure from the precedents of this Court and every other Circuit, *see* Pet. Br. at 12-15, and it necessitates the response that SPDs cannot be "extraneous documents" because they are "plan documents." Under the jurisprudence of this Court, the issue is thus preserved and ripe:

> Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed **or** passed upon below.' [Citation.] That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon, is illustrated by some of our more recent dispositions. [Emphasis added.]

United States v. Williams, Jr., 504 U.S. 36, 41 (1992). *Accord City of Springfield v. Kibbe*, 480 U.S. 257, 266 (1997) (O'Connor, J., Dissenting, with White, C.J., and Powell, J.), *reh'g denied*, 481 U.S. 1033 ("The standard we previously have employed is that we will not review a question not pressed *or* passed on by the courts below.")